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Supreme Court, U.S.
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In The Supreme Court of the United States

ANGEL WATKINS,
Petitioner,

v.

PROFESSIONAL SECURITY BUREAU,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the affirmative defense to a claim of hostile work environment, as described by this Court in Burlington Industries v. Ellerth, available when the alleged hostile work environment has resulted in a "tangible" employment action against the plaintiff employee, even if not specifically pled?

2. When the affirmative defense to a hostile work environment claim is available, can the defense be applied to defeat a hostile work environment claim even if the employee properly took advantage of preventive or corrective opportunities provided by the employer, thus removing the second element of the defense?

3. In a claim under Title VII of employment retaliation for engaging in protected conduct, what evidence must a plaintiff present to defeat the employer's contention that plaintiff's termination was based on a nonretaliatory reason related to job performance, for purposes of overturning a jury verdict in favor of plaintiff and granting judgment to the employer?

4. Under standards articulated by this Court in its recent Opinion of Kolstad v. American Dental Association, can punitive damages in a claim under Title VII be imposed upon an employer for failing to properly investigate and correct sexual harassment or hostile work environment situations and when a manager's sexual harassment conduct was especially egregious, assuming that the employer had a sexual harassment policy?

PARTIES TO THE PROCEEDING

Including the parties named in the caption of this Petition, the Petitioner is:

Angel Watkins.

Including the parties named in the caption of this Petition, the Respondent is:

Professional Security Bureau, Limited.

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IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 1999

ANGEL WATKINS

Petitioner,

v.

PROFESSIONAL SECURITY BUREAU,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Angel Watkins, by her counsel ("Petitioner" or "Appellant"), and proceeding under applicable Rules of this Court, respectfully requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinions of the United States District Court for the District of Maryland are in the form of a bench ruling on September 4, 1998, granting Respondent's motion for judgment on punitive damages (Appendix B) and a memorandum opinion of October 22, 1998, granting Respondent's motion for judgment as a matter of law, or for new trial. (Appendix C and D). Both opinions are unreported.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the District Court, was issued November

15, 1999. The per curiam opinion is unreported but may be found at 1999 WL 1032614.

STATEMENT OF JURISDICTION

This was an action alleging, among other things, hostile work environment and unlawful adverse employment action (termination) in retaliation for protected activity (reporting sexual harassment conduct), under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. The alleged discrimination was committed in Maryland. Jurisdiction of the District Court was invoked under 28 U.S.C. 1343(4).

Petitioner filed her claim of sex discrimination, harassment and retaliation with the Equal Employment Opportunity Commission on or about September 18, 1996 and on or about November 10, 1996. She received her Notice of Right to Sue, dated December 17, 1996. Her complaint in the District Court was filed on or about February 20, 1997.

On September 3, 1998, the jury returned a verdict in Petitioner's favor, awarding compensatory damages. The District Court then conducted a hearing on Respondent's motion for judgment on punitive damages, granting the motion. An Order of Judgment was entered September 4, 1998.

Respondent then timely moved for judgment as a matter of law or for a new trial, on the merits. Petitioner responded. By Memorandum Opinion and Order dated October 22, 1998, the District Court granted the motion, thus overturning the verdict.

Petitioner filed a timely amended notice of appeal on November 16, 1998. Jurisdiction of the United States Court of Appeals for the Fourth Circuit was invoked under 28 U.S.C. §1291 and under Rule 50(c). Under Rule 50, an appellate court may review a trial court's grant of judgment notwithstanding verdict or in the alternative a new trial, since in such instances the trial court's decision is deemed final.

On November 15, 1999, the Fourth Circuit issued its per curiam opinion affirming the District Court. This Petition is being submitted within 90 days of the Fourth Circuit's Opinion. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Hostile work environment:

42 U.S.C. §2000e-2(a)(1) (Section 703 of Title VII)--it is an unlawful employment practice for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, because of such individual's....sex."

Retaliatory discharge:

42 U.S.C. §2000e-3(a)--it is an unlawful employment practice "for an employer to discriminate against any of his employees...because he has opposed any practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding or hearing under this title."

Punitive damages:

42 U.S.C. §1981a(b)--a complaining party "may recover punitive damages under this section against a respondent" if the complaining party demonstrates the respondent engaged in a discriminatory practice "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

STATEMENT OF THE CASE

A. Procedural Background

Petitioner's employer was Respondent Professional Security Bureau, Ltd. ("PSB" or "Respondent"). Petitioner's Complaint sought declaratory and injunctive relief, reinstatement with back pay, compensatory damages, punitive damages (no figure was stated for compensatory or punitive damages), in

addition to attorney fees, interest, and costs. Petitioner also sought a jury trial. (Appendix A). The Complaint was answered on or about April 21, 1997.

Trial in the District Court (Maletz, J.) began on August 31, 1998 and continued to September 3, 1998. The matter proceeded to the jury on compensatory damages only. On September 3, 1998, the jury returned a verdict for Petitioner in the amount of $63,222: $3,222 direct damages and $60,000 non-economic damages.

The issue of punitive damages was heard by the Court (Maletz, J.) on September 4, 1998. The Court granted PSB's motion for judgment, determining that punitive damages would not be submitted to the jury. This ruling concluded all claims. The District Court entered judgment for Petitioner for $63,222.

On or about September 11, 1998, PSB submitted another motion for judgment or for new trial. Appellant responded on September 23, 1998. To preserve appeal rights, Petitioner submitted a notice of appeal regarding the District Court's September 4 judgment, on October 2, 1998.

On October 22, 1998, the District Court (Maletz, J.), acting without a hearing, issued a memorandum and order granting PSB's motion for judgment or for new trial. On November 17, 1998, Petitioner submitted an amended notice of appeal.

On November 15, 1999, the Fourth Circuit affirmed the District Court. Affirmance was by per curiam decision.

B. Statement of Relevant Facts

Professional Security Bureau, Ltd. is a corporation operating a security business and providing security guards for various corporate clients on the East Coast. Its clients are located in New Jersey, New York, Pennsylvania, Maryland, and Virginia. It has about 3,000 employees, with about 50 in Maryland.

Petitioner Angel Watkins was a security guard with PSB in Maryland. She started in August of 1995. She is a single mother and has had to maintain employment to support herself and her children, to the point of going back to work within days of having her second child.

The company maintained at trial that it provides sexual harassment training for its employees. However, Ms. Watkins testified that she was hired almost immediately after she turned in her application and that she received little or no formal training from PSB on sexual harassment or other employment areas. There was testimony that PSB has a sexual harassment policy, also addressed in an employee handbook. However, Ms. Watkins stated that she never received any employee handbook or other documentation concerning any company policy regarding sexual harassment or employment discrimination.

Ms. Watkins' supervisor was Donald Nicola. His supervisor, in turn, was Edward Kelley, Director of Security, who had been with the company since 1985, and was the branch manager for the region that encompassed New Jersey, New York, Pennsylvania and Maryland. Thus, Mr. Kelley had company authority over Ms. Watkins, her co-workers or supervisors, and Mr. Nicola. The company's vice president for operations at the time was Charles Fisher.

From August, 1995 to December 1995, Ms. Watkins had no difficulties in her job. Her performance was satisfactory and she was not subject to disciplinary actions. As noted, she even returned to work a week after having her second child on January 7, 1996. She was a valuable worker, and was one of Mr. Nicola's favorite employees. He called her "my little angel."

Petitioner acknowledges that during her security post at Bennett House, a local retirement home, she experienced some difficulty managing child care and her job duties. But she never

abandoned her post. On one occasion, Mr. Nicola told her that he would spell her at her post, so she could pick up her children. He also told her that she should come to work and report to her post even if it meant bringing her children along.

However, Mr. Kelley, learning of that situation, left a message with Ms. Watkins to come to the Lutherville office to see him. She did so, meeting with Mr. Kelley at 7 a.m. on May 24, 1996. She was without her uniform because she only had one, and she had not had a chance to get it washed. She was wearing a skirt and a blouse. He was behind his desk. Mr. Kelley discussed Ms. Watkins' baby sitter problem and why she did not have her uniform.

Then, Mr. Kelley became abusive. He called Ms. Watkins stupid and dumb and an unfit mother. She told Mr. Kelley that she did not "abandon" her post. Ms. Watkins got up to leave. But Mr. Kelley came from behind his desk and shoved her into the conference room. There, he pinned her to the wall and forced her to have sexual intercourse with him. She tried to push him off, but he was too strong. Ms. Watkins protested and told Mr. Kelley to stop, but he told her to shut up.

At that moment, there was a noise as if someone was in the hallway. Mr. Kelley zipped up his pants and went to see what the noise was. Ms. Watkins saw her chance to leave the room quickly, and did so. The incident lasted about a half an hour. After she got home, she got a call from the office making sure she would be at work the next day.

Ms. Watkins testified that she talked to her doctor about the incident in May, 1996. She contacted police in August, 1996. A report was filed (Police Report 96-262-1890, filed with the Baltimore County Police Department). However, no charges were brought against Mr. Kelley. Ms. Watkins also later talked to Marilyn Jackson, of the human resources department at PSB.

However, from May, 1996 to August, 1996, about three months, Ms. Watkins did not say anything to anyone at PSB the incident. In August of 1996, she was meeting with Hazel Dowling, a site supervisor, to do training on a new job site. At that time, she revealed to Ms. Dowling what Mr. Kelley had done to her in May. Ms. Watkins was too embarrassed to reveal all of the details and Ms. Dowling did not want to hear all the details, so Ms. Watkins stopped the story at saying that Mr. Kelley had fondled her under her clothing.

Ms. Dowling reported the story to Mr. Nicola. Mr. Nicola said he would investigate. The next day, he came to Ms. Watkins' post at Bennett House to interview her about the incident. Ms. Watkins repeated the incident as she revealed it to Ms. Dowling. Mr. Nicola said he would investigate further, and told her not to speak to anyone else at PSB about it. However, neither Ms. Dowling nor Ms. Watkins heard anything more about any other investigation which may have been conducted by Mr. Nicola or by anyone else at PSB.

Mr. Nicola said Ms. Dowling told him that Ms. Watkins did not want to pursue any charges, and that Ms. Watkins had confirmed this in his discussion of the incident with her. Ms. Watkins denies this. Mr. Nicola also said he made a report about the incident to Mr. Fisher, vice president for operations, and that Mr. Fisher told Mr. Nicola that he would follow up on it. But Mr. Nicola did not hear anything more about it from Mr. Fisher.

Mr. Fisher apparently took no action because Mr. Nicola said Ms. Watkins did not want to pursue the matter, and because Mr. Kelley would be leaving the company, in any event. Yet, in August of 1996, Mr. Kelley was out on disability due to injuries he sustained in an auto accident, having not yet been relieved.

Mr. Fisher acknowledged that he never met with Ms. Watkins about the incident. Mr. Fisher had a phone conversation

with Mr. Kelley about it, in which Mr. Kelley denied the incident. Mr. Fisher testified that he told Mr. Kelley not to have any further contact with Ms. Watkins. Mr. Fisher also said Ms. Watkins did not contact the company human resources department about the incident, although Ms. Watkins testified otherwise. These exchanges appeared to have settled the matter, as far as Mr. Fisher and the company was concerned.

Also in August, 1996, during her job post at Bennett House, Ms. Watkins had locked keys in a lounge when she left that area to assist a resident. She called the building manager who said Ms. Watkins could see the custodian and get a master key to retrieve the keys she locked in the room. Ms. Watkins did so, but the custodian did not have a master key. Ms. Watkins contacted the building manager and other security, and was informed that the situation was not serious, she could go home if her security post time was up, and she could retrieve the keys the next day. However, apparently Bennett House management was upset about the incident and PSB eventually lost the account.

On September 16, 1996, after the Bennett House situation--and, not coincidentally, only about three weeks after Ms. Watkins reported the incident involving Mr. Kelley to Ms. Dowling and to Mr. Nicola--Ms. Watkins was called by Mr. Nicola to a meeting in Mr. Kelley's PSB office. At the meeting was Mr. Nicola, Mr. Kelley, and another co-worker.

Mr. Kelley asked Ms. Watkins about her leaving her post. He told her he had bent over backwards to save her job but she was still "messing up." Mr. Nicola said nothing. Ms. Watkins stood up to leave. But Mr. Kelley told her the meeting was not over and to sit down. He told her he was going to fire her. Ms. Watkins responded that she did not owe him any favors and was tired of his taking advantage of her. She said she was going to get a lawyer and was going to report the sexual harassment and

rape incident to the EEOC. Mr. Kelley told her to get the hell out of his office.

Mr. Nicola later called Ms. Watkins and told her to bring in her uniform because she was terminated. She did so the next day, and asked for a copy of her work record. She testified that, at that time, she was not informed of the reason for her termination.

Ms. Watkins had to take a job with a maid service to supplement her income. She continued to work as a clerk for the post office, as she had done since July, 1996. She estimated her total economic pay loss since her termination from PSB at $5,000 to $7,000 annually. She also became upset, depressed, and suicidal. She experienced psychological stress, loss of appetite, inability to hold a relationship, and loss of sleep.

Further, when Ms. Watkins told Ms. Dowling about the incident, Ms. Dowling told her this was not the only person at PSB who had been the target of unwanted sexual advances by Mr. Kelley. Another employee, Kia Odom, had been harassed by him, apparently in a similar fashion. Mr. Nicola was aware of this. Ms. Watkins believed Mr. Kelley still intended to get "favors" from Ms. Watkins if she had continued to work at PSB.

PSB claimed it had a sexual harassment policy, including employee training, handbook materials, and a video. However, this policy was described by Mr. Fisher as "an on-going development of the corporate training department." And the company video on the topic was not even made until 1997.

The evidence as to PSB's policy was contradictory, particularly over whether training was given and the timing of the policy regarding the events surrounding the May, 1996 rape incident. In fact, Mr. Fisher, vice president for operations, himself never received sexual harassment training while at PSB.

A policy statement about sexual harassment was posted

on a wall in PSB's Maryland office, along with other announcements. It is unclear whether employees' attention was called to it. Ms. Watkins said she never saw such a notice.

At trial, the jury was instructed as to quid pro quo sexual harassment, hostile work environment, and retaliation. On September 3, 1998, the jury returned a verdict for Petitioner. Responding on a special verdict form, the jury found for PSB as to quid pro quo sexual harassment. Notwithstanding this finding, the jury found that sexual harassment had occurred and found PSB had created a hostile work environment. The jury awarded damages of $63,222.

C. District Court's Ruling on Punitive Damages

Granting the Respondent's motion on punitive damages, the District Court noted that Ms. Watkins did not bring the May 1996 incident to the attention of anyone at PSB until August of that year, and then did not describe the incident in terms of rape. Even though the incident was "reprehensible," the Court found it was not part of and did not reflect a "continuum of conduct" by PSB regarding sexual harassment. [See Appendix at 5a et seq.].

The Court said once the incident was reported, PSB officials looked into it. "The evidence shows that Fisher told Kelley to stay away from her. There is no evidence of similar conduct by Kelley or by any other employee of the defendant company." Therefore, "the Court cannot find that the conduct in question was so egregious as to warrant the imposition of punitive damages. More specifically, the Court finds that no jury could reasonably find the existence of punitive damages." [Appendix at 8a-9a].

D. District Court Grants Judgment to PSB on Merits

Granting the subsequent motion by PSB for judgment as a matter of law [Appendix at 28a et seq.], the District Court found, as to hostile work environment, that the claim was

demonstrated but that an affirmative defense was also established. The Court observed an employer can present a defense to liability if it can show it a) exercised reasonable care to prevent or promptly correct the behavior and b) the plaintiff "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." The District Court then added [App. at 30a-31a]:

> The court finds that Professional Security has not only presented sufficient evidence to establish the affirmative defense, but additionally that there is insufficient evidence for permitting any other finding. The evidence supporting Professional Security's affirmative defense is so overwhelming and one-sided that the court cannot uphold the jury's rejection of that defense.
>
> It is undisputed that Watkins waited until August, 1996, nearly four months, before she complained to anyone at Professional Security about the harassment, at which time she told one of her site supervisors, Hazel Dowling, only that Kelley had 'grabbed' or 'touched' her breasts. She did not inform anyone at Professional Security, at any time, that she was the victim of forced sexual intercourse. * * *
>
> It also is undisputed (1) that Professional Security had a policy against sexual harassment, (2) that it promptly investigated Watkins's complaint, (3) that it took remedial action by directing Kelley not to have further contact with Watkins, and (4) that Kelley did not harass Watkins again.

Therefore, the District Court found:

> In light of the undisputed evidence, the only reasonable conclusion that the jury could reach in this case is that Professional Security exercised reasonable

> care to prevent and correct promptly the sexually harassing behavior and that Watkins, by not complaining to anyone at Professional Security about the harassment until August 1996, unreasonably failed to take advantage of any preventive or corrective opportunities provided by Professional Security or to avoid harm otherwise. Hence, Professional Security must prevail against Watkins on the affirmative defense to the claim of sexually hostile work environment as a matter of law.

As to the claim of retaliation, the District Court found Petitioner did not establish the requisite "causal connection" between her termination and her engaging in protected activity, or, that PSB presented a legitimate reason for her termination (Ms. Watkins' alleged job performance problems) which Petitioner did not show was a pretext. The District Court stated [Appendix at 32a-33a]:

> Even if the court assumes that Watkins presented sufficient evidence of a causal connection, Professional Security has articulated legitimate, nonretaliatory reasons for her termination and Watkins has failed to offer sufficient evidence that the reasons were pretexual. Concededly, Watkins offered some evidence on this score. Her evidence, however, consisted essentially of offering her own opinion that her job performance had been satisfactory. She testified that she had been given only one uniform, which she had needed to launder, and that she had left her post unattended to assist elderly residents.

Therefore, as to the retaliation claim:

> In light of all the evidence, including the uncontradicted testimony that Professional Security investigated the circumstances that necessitated Watkins leaving her post unattended, this evidence is insufficient to discredit, in the mind of a reasonable juror, Professional Security's legitimate, nonretaliatory explanation for her termination. Accordingly, Watkins has failed, as a matter of law, to meet her ultimate burden of showing that Professional Security had a retaliatory motive in discharging her.

E. Fourth Circuit Affirms District Court

Affirming the District Court, the Fourth Circuit found that Ms. Watkins' testimony that she did not receive sexual harassment training could not be believed. [See Opinion at fns. 7 and 15, and accompanying discussion]. It also indicated that her job performance difficulties provided sufficient basis for her termination and that this rationale was not a pretext.

As to the affirmative defense available to a claim of hostile work environment (see Burlington Industries, Inc. v. Ellerth, 524 U.S. ___, 141 L.Ed.2d 633, 118 S.Ct. 2275 (1998)), the Fourth Circuit recognized that this Court identified two types of sexual harassment cases: "those in which threats of adverse action in retaliation for denial of sexual favors are carried out in the form of a tangible employment action, and those in which no tangible employment action is taken." [Opinion at p. 7, emphases supplied].

The "affirmative defense" employed by the District Court, was identified by this Court in Burlington as available when no "tangible" employment action is taken. However, the Fourth Circuit determined the defense was available here, even though Petitioner was terminated, because her contention of adverse employment action supposedly was restricted to her retaliation

claim. Thus, no "tangible" employment action was connected to her hostile work environment claim.

Thus applying the affirmative defense in Burlington, the Fourth Circuit concluded that "no reasonable jury could fail to determine that PSB acted reasonably "'to prevent and correct promptly any sexually harassing behavior.'" [Noting Burlington]. PSB offered "essentially uncontradicted evidence" that it had in place a "comprehensive policy" against sexual harassment. [Opinion at 8]. The Fourth Circuit also found that "there can be no dispute that PSB acted promptly upon learning of Watkins' allegations of sexual harassment."

The Court also concluded Ms. Watkins had "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" by not reporting the incident in accordance with PSB's sexual harassment policy. [Opinion at 10-11]. The Court found Ms. Watkins' claims of embarrassment and fear of reprisal were not sufficient reasons for the delay. Therefore, "Although Watkins established the existence of a hostile environment, we conclude that no rational jury could have failed to find that PSB established the elements of the affirmative defense to liability set forth in Burlington Industries." [Opinion at 13]. In addition, the Fourth Circuit indicated that if the first element of this affirmative defense is shown, it may be applied even if the second element is not. [Footnote 18].

Affirming the District Court's ruling for Respondent on Petitioner's retaliation claim, the Fourth Circuit concluded that PSB offered a legitimate and non-discriminatory reason for Petitioner's discharge, in that Ms. Watkins had once left her post at Bennett House. The Court said Petitioner "offered no evidence whatsoever that this reason was a mere pretext for retaliation." [Opinion at 13]. Accordingly, her claim failed as a matter of law.

REASONS FOR GRANTING WRIT

I. UNDER *BURLINGTON*, THE AFFIRMATIVE DEFENSE TO A HOSTILE WORK ENVIRONMENT CLAIM IS NOT AVAILABLE WHERE THERE HAS BEEN A TANGIBLE EMPLOYMENT ACTION, AND SUCH A TANGIBLE EMPLOYMENT ACTION WAS SHOWN IN THIS CASE.

In Burlington Industries, Inc. v. Ellerth, 524 U.S. ___, 141 L.Ed.2d 633, 118 S.Ct. 2257 (1998), this Court discussed the "affirmative defense" to a hostile work environment claim in the context of a victim of employment sexual harassment who does not reveal that harassment, who takes no action during employment concerning the harassment, and who does not suffer adverse, tangible job consequences as a result of the harassment or her attempts to correct it while employed.

This Court noted, perhaps in an observation of the difficulty the judiciary has had in considering workplace sexual harassment claims under Title VII, that the Court of Appeals for the Seventh Circuit, reversing summary judgment granted to the employer, conducted an en banc review which resulted in eight separate opinions and "no consensus for a controlling rationale." (141 L.Ed.2d at 645). This observation also suggests the hostile work environment and affirmative defense standards are still evolving concepts, so that a jury determination is entitled to considerably more weight when a trial court is faced with a motion for judgment as a matter of law, for judgment notwithstanding verdict, or for new trial.

This Court noted a demarcation between harassment situations in which threats of adverse action if sexual favors are not forthcoming are not carried out (quid pro quo harassment) as opposed to situations where such threats are carried out (hostile

work environment). The Court engaged in an extensive discussion of these variations, and stated (141 L.Ed.2d at 648):

> When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII. For any sexual harassment preceding the employment decision to be actionable, however, the conduct must be severe or pervasive.

The Court considered circumstances in which a hostile work environment situation does not necessarily result in "tangible" adverse action against the victimized employee. The Court turned to policy issues regarding Title VII's purpose in encouraging antiharassment policies and "effective grievance mechanisms." The Court stated, "Were employer liability to depend in part upon an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context." (141 L.Ed.2d at 654, citations omitted). Limiting employer liability in such contexts "could encourage employees to report harassing conduct before it becomes severe or pervasive" and so "would also serve Title VII's deterrent purpose."

The Court crafted a defense to such circumstances "to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees... ." (141 L.Ed.2d at 654-655). An employer can be vicariously liable for "an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over an employee."

However, "When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence." [Emphasis supplied, citations omitted]. The defense is established if the employer shows that it 1) exercised "reasonable care" to prevent and correct promptly any sexually harassing behavior and 2) the employee "unreasonably failed" to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

As this Court clearly described, "no affirmative defense is available" when the supervisor's harassment "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." That was the situation here. The Fourth Circuit should not be permitted to ignore the limits of the affirmative defense to a hostile work environment claim by pigeonholing Petitioner's claims.

In her Complaint, Petitioner did not differentiate between her hostile work environment claim and her retaliation claim in seeking relief for the sexual harassment she endured at PSB which eventually resulted in her termination. Her claims arose from the same set of facts and the same background of harassment and intimidation. [See Complaint, esp. at App. at 2a-3a]. She therefore contended that her termination was the result of sexual harassment as well as in retaliation for her engaging in protected activity (reporting the May, 1996 rape incident to authorities and to the EEOC).

As alleged and as the evidence bore out, this hostile work environment situation did result in "tangible employment action." The Fourth Circuit mischaracterized Petitioner's claim in concluding that the adverse employment action related only to her claim of retaliation. It decided that since Petitioner

supposedly was not contending that the "tangible" employment action occurred in the context of a hostile work environment, the defense was available. This was not a fair reading of Petitioner's claims. The defense should not have been applied.

This Court should grant this Petition to clarify that when a tangible employment action has resulted from the circumstances which form the basis of an employee's complaint under Title VII, the affirmative defense described in Burlington Industries is not available. Separating the employment action from the technical claim itself, most especially if the action is termination, is not appropriate when considering whether to apply the defense.

II. IF THE AFFIRMATIVE DEFENSE UNDER *BURLINGTON* TO A HOSTILE WORK ENVIRONMENT CLAIM IS AVAILABLE, EVIDENCE ESTABLISHING THE FIRST ELEMENT OF THE DEFENSE SHOULD NOT BE SUFFICIENT TO PERMIT AN EMPLOYER TO APPLY THE DEFENSE, IF THE SECOND ELEMENT OF THE DEFENSE IS NOT SHOWN

Even if the affirmative defense to a hostile work environment claim was available in these circumstances, it should not have been applied because the evidence did show that Petitioner took reasonable steps to "take advantage of any preventive or corrective opportunities provided by the employer." The Fourth Circuit conceded this possibility and yet found that the affirmative defense could be applied.

The Fourth Circuit stated (footnote 18) that "Although the Supreme Court did not speak to this issue in *Burlington Industries*, we cannot conceive that an employer that satisfies the first element of the affirmative defense and that promptly and adequately responds to a reported incident of sexual harassment--as PSB did here [reference omitted]--would be held liable for the

harassment on the basis of an inability to satisfy the literal terms of the second element of the affirmative defense." Citing Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999), at 265-66, and Coates v. Sundor Brands, Inc., 164 F.3d 1361 (11th Cir. 1999), at 1369 (Barkett, J., concurring specially). The Fourth Circuit suggested, quoting the concurrence in Coates, that under Burlington, "a prompt response by an authorized agent to halt reported harassment is sufficient to relieve the employer of liability under Title VII" where the affirmative defense is available. Any other result, the Fourth Circuit stated, "would be wholly contrary to a laudable purpose behind limitations on employer liability identified by the Supreme Court in Burlington Industries: to promote conciliation."

Such a statement essentially cuts the affirmative defense, and the employer's burden, in half. The Fourth Circuit not only ignored the limits of the affirmative defense to a hostile work environment claim, but applied it half-heartedly in affirming the District Court's essential dismissal of her claim as a matter of law, and in the process overturning a jury verdict favorable to Petitioner.

Promoting conciliation in sexual harassment situations and fostering an environment where sexual harassment is not a concern for employees are worthy goals. But interest in achieving those goals should not lead to absolving an employer from a need to show, as an essential part of interposing an affirmative defense to a hostile work environment claim,, that the employee failed to "take advantage of any preventive or corrective opportunities provided by the employer." The Fourth Circuit suggests that if this showing was not made in the present matter, then the defense, was not established. Thus, the hostile work environment claim should have proceeded and the jury's verdict should not have been overturned.

This Court should grant the Petition and emphasize that both elements of the affirmative defense to a hostile work environment claim, if available, are to be shown. Therefore, it is the employer's burden to demonstrate that it exercised "reasonable care" to prevent or promptly correct the behavior and that the plaintiff employee "unreasonably failed" to take advantage of any "preventive or corrective opportunities" or "to avoid harm otherwise."

The affirmative defense in Burlington is not a shortcut means for an employer faced with a hostile work environment claim to exit the courthouse. This Court should grant this Petition and clarify both the limits and the role of this defense.

III. PETITIONER'S RETALIATION CLAIM WAS WELL ESTABLISHED, AND THE EMPLOYER DID NOT SHOW, UNDER PREVAILING STANDARDS, A LEGITIMATE NON-RETALIATORY REASON FOR ITS TERMINATION OF PETITIONER

Turning to Petitioner's retaliation claim, the District Court found that Respondent had presented a legitimate and non-retaliatory rationale for her termination which Petitioner did not meet with any evidence that this rationale was a pretext. The Fourth Circuit affirmed, pointing out that Ms. Watkins had once left her post at Bennett House. The Fourth Circuit said Petitioner "offered no evidence whatsoever that this reason was a mere pretext for retaliation."

This conclusion is a selective view of the evidence. It also completely disregarded the jury's careful deliberation over the days of testimony it heard on Petitioner's sexual harassment and retaliation claims. Petitioner certainly showed that she was terminated in the same month (August, 1996) that she reported the May, 1996 rape incident to co-workers, her supervisor, and

the police. She was terminated for supposedly "leaving her post" or other employment infractions which were not cause for any termination previously. Just a year before, she was considered by Donald Nicola at PSB as a favorite employee. He understood her circumstances and assisted her as she tried to work out her child responsibilities and her job duties. The evidence suggested that Petitioner had not been previously disciplined at PSB. Yet, when the facts of the May, 1996 incident came to light and Mr. Kelley realized that Ms. Watkins would not submit to his controlling and manipulative behavior, Ms. Watkins was dismissed.

At the very least, the evidence was sufficient to permit a jury to decide whether PSB's rationale for Ms. Watkins' dismissal was a pretext, given the circumstances. The jury found that she was entitled to recover. That finding should not have been disturbed.

This Court should grant this Petition to review circumstances in which a trial court (and, subsequently, an appellate court) can remove from jury consideration core features of a retaliation claim, such as whether the plaintiff employee has shown that the employer's termination rationale is pretexual. These are proper matters for a trier of fact. A finding as a matter of law that the employee has not met that burden should be exceedingly rare, and was inappropriate in this instance.

IV. UNDER THIS COURT'S RECENT OPINION OF *KOLSTAD V. AMERICAN DENTAL ASSOCIATION*, PUNITIVE DAMAGES WERE AVAILABLE TO PETITIONER AND THE DISTRICT COURT ERRED IN REFUSING TO PERMIT JURY CONSIDERATION OF PUNITIVE DAMAGES.

Finally, this case should be remanded for a further consideration of punitive damages in light of this Court's Opinion

in Kolstad v. American Dental Association, 527 U.S. 576, 144 L.Ed.2d 494, 119 S.Ct. 2118 (1999). The case was decided while the appeal to the Fourth Circuit was pending. The Fourth Circuit did not consider Kolstad, in that it did not reach the punitive damages issue. Nevertheless, particularly since Kolstad, it is clear that the District Court erred in granting Respondent's motion for judgment, removing punitive damages from jury consideration.

In Kolstad, this Court, reviewing 42 U.S.C. §1981a, found that the statutory language of "malice" and "reckless indifference" for imposing punitive damages relate to an employer's "state of mind." The employee must show that the employer not only directly engaged in discriminatory conduct, but also that the employer was aware that this conduct violates federal law. However, a plaintiff need not show "egregious" or "outrageous" discrimination independent of showing that the employer's "state of mind" revealed an awareness that the discrimination at issue was a violation of federal law and policy.

The Kolstad decision stated that, consistent with standard agency principles that are applicable generally to Title VII situation, punitive damages may be imposed upon an employer due to the intentional actions of an employee or agent if that person was employed in a managerial capacity and was acting in the scope of employment when engaging in the offending conduct. As such, an employer's conduct need not be independently "egregious" to satisfy §1981a's requirements for a punitive damages award, "although evidence of egregious misconduct may be used to meet the plaintiff's burden of proof." [144 L.Ed.2d at 512]

However, to support Title VII's broader objective of employer development of reasonable and practical workplace policies on sexual harassment, an employer may not be held vicariously liable for the discriminatory employment decisions of

managerial agents if those decisions are "contrary to the employer's good faith efforts to comply with Title VII." [See discussion at 144 L.Ed.2d at 510-512]. Such an approach may "motivate" employers to "detect and deter Title VII violations." [114 L.Ed.2d at 512, citing case at issue, at 139 F.3d 958, dissent].

In so deciding, the Kolstad Court did not expressly overturn the general approach that the mere existence of a sexual harassment policy is not in itself an indication that malice or recklessness is absent from sexually harassing conduct. Rather, it reiterated that there must be some showing of a "good faith" effort by the employer on these concerns which sets the employer's attitude so far apart from the conduct of an offending manager, that vicariously liability should not be imposed on a policy basis. That showing was not made in these circumstances.

There was no investigation by PSB, to speak of, after Ms. Watkins' report of the incident. That Mr. Kelley was told to stay away from Ms. Watkins, after Mr. Fisher learned that he may have raped her, is hardly a shining example of corporate concern about sexual harassment. There was evidence from four witnesses (Ms. Watkins, Ms. Dowling, Mr. Nicola, and Mr. Fisher) that Mr. Kelley had sexually harassed another employee, Ms. Kia Odom, prior to this incident. There is no indication that the company, despite its sexual harassment policy, did anything to investigate or take corrective action as to that incident.

What sexual harassment training was given to employees in 1996 or earlier, was the subject of considerable conflict. There certainly was no training video at that time. Even Mr. Fisher said he was not given such training. Also, there were no "posters throughout the plant" as to sexual harassment (as suggested by the District Court, see App. at 6a). There was one posting of the 1992 memorandum, on a board in a conference room.

There was sufficient basis for a jury to consider punitive damages. The evidence of PSB's conduct was not sufficient to overcome vicarious imposition of punitive damages for Mr. Kelley's outrageous and egregious conduct.

In general, punitive damages is an extraordinary remedy. See, as to decisions noted by the Fourth Circuit, Harris v. L & L Wings, Inc., 132 F.3d 978 (4th Cir. 1997), and Stephens v. South Atlantic Canners, Inc., 848 F.2d 484 (4th Cir. 1988). Punitive damages are to be awarded where "the twin aims of punishment and deterrence are paramount." A plaintiff seeking punitive damages in a Title VII sexual harassment claim must make a "heightened showing" of the culpable state of mind of the employer, not just of the harasser. This showing can include: 1) evidence of the employer's attitude towards sexual harassment, 2) direct statements by the employer about plaintiffs' rights or complaints, and 3) the egregiousness of the conduct at issue.

As the Harris Court stated [citations omitted]:

> The legal standard of 'prompt and adequate remedial action' in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser. And a good faith investigation of alleged harassment may satisfy the 'prompt and adequate' response standard, even if the investigation turns up no evidence of harassment. Such an employer may avoid liability even if a jury later concludes that in fact harassment occurred.

Thus, the existence of a sexual harassment policy is not dispositive. The extent of that policy in 1996 and the extent of training concerning it was a matter for the jury. The investigation undertaken by PSB of the incident was minimal. No disciplinary action was taken against the offending employee. There was evidence that this supervisor had engaged in sexual harassment against at least one other female employee. Petitioner heard

nothing more about her report and was told not to say anything about it to anyone else in the company. And the conduct was most assuredly "egregious."

In Jonasson v. Lutheran Child and Family Services, 115 F.3d 436 (7th Cir. 1997), the court found punitive damages appropriate in a sexual harassment claim involving a school. The court remarked upon the employer's "ostrich-like failure" to deal forthrightly with the principal's harassment of three young employees over a period of time. The school was aware of previous incidents but took no substantive action. There was never anything put in the principal's file regarding the harassment despite these reports, the school was lenient in its treatment of the principal in order to avoid a lawsuit by him, and the school took "woefully corrective action" against the principal.

The court noted "the jury was entitled to conclude from the evidence presented that [the school] showed a lack of remorse and that such conduct was likely to happen again. Such an 'intentional disregard for the statutory rights of its female employees' justifies the award of punitive damages.'" Citing Emmel v. Coca-Cola Bottling Co., 95 F.3d 627 (7th Cir. 1996).

In Turic v. Holland Hospitality, Inc., 849 F.Supp. 544 (W.D. Mich. 1994), considering a claim of pregnancy discrimination and religious discrimination as to the plaintiff employee's decision to obtain an abortion, which ultimately resulted in her discharge by the employer because of the controversy the situation created with other employees, the court upheld a $300,000 punitive damages award, even though the court found that the employer was not necessarily motivated by malice. The court found, nevertheless, that the manner in which the employer responded to the employee's consideration of an abortion was recklessly indifferent to her rights not to suffer an adverse employment action due to pregnancy. The court stated,

"Defendant moved swiftly to remove a 'troublemaker,' without regard to the fact that the source of the 'trouble' was a federally protected status."

See also, e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581 (5th Cir. 1998) (approving punitive damages, although remitting the amount from $100,000 to $75,000 where compensatory damages were only $19,000, although evidence of malice or reckless indifference were not overwhelming); Doe v. R.R. Donnelly & Sons Co., 42 F.3d 439 (7th Cir. 1994) (as to punitive damages); Hennessy v. Penril Datacomm Networks, 69 F.3d 1344 (7th Cir. 1995) (evidence sufficient to support punitive damages award); Hearn v. General Electric Co., 927 F.Supp. 1486 (M.D. Ala. 1996); Lawyer v. 84 Lumber Co., 991 F.Supp. 873 (N.D. Ill. 1997) (punitive damages found available but remitted from $250,000 to $100,000); Emmell v. Coca-Cola Bottling Co., 904 F.Supp. 723 (N.D. Ill. 1995), aff'd, 95 F.3d 627 (policy of sex discrimination in promoting warranted punitive damages of $500,000), and Deters v. Equifax Credit Information Service, Inc., 981 F.Supp. 1381 (D.Kan. 1997) (approving punitive damages award of $295,000).

Even before Kolstad, if the Kolstad Opinion would not apply to the District Court's punitive damages determination since that determination was made prior to the issuance of the Opinion, courts have considered the employer's overall attitude and policy toward sexual discrimination when reviewing imposition of punitive damages, particularly under §1981a, and despite the existence of a sexual harassment policy. Promulgating such a policy and placing it in any employee handbooks or on bulletin boards should not be enough, in itself, to insulate an employer from punitive damages liability from sexual harassment conduct so egregious that it would constitute a criminal offense. Rather than being a shield against punitive damages, the presence

of a sexual harassment policy should merely be one factor in a more comprehensive review of the specific circumstances. This Court should grant this Petition to review under what circumstances will the mere existence of a sexual harassment policy absolve an employer from punitive damages in a Title VII claim, especially if the conduct was committed by a manager, was egregious, and was either poorly handled or poorly investigated.

Punitive damages clearly should have been imposed here. Petitioner requests that this Court grant her petition and further clarify the role that the mere presence or existence of an employer's sexual harassment policy will play in the overall consideration of imposing punitive damages upon that employer in Title VII claims arising from egregious sexual harassment.

CONCLUSION

Accordingly, Petitioner respectfully requests that her petition for a writ of certiorari be GRANTED.

RESPECTFULLY SUBMITTED,

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